



Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES	)	
OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
TONY RICHARDS	)	BRB Nos. 06-0783
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES	)	
OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE	)	
COMPANY	)	DECISION and ORDER
	)	and
Employer/Carrier-	)	DECISION and ORDER
Respondents	)	on RECONSIDERATION

Appeals of the Supplemental Order After Remand Awarding Reduced Attorney Fees and Costs with Enhancement Factor of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Approval of Attorney Fee (Supplemental) of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Supplemental Order After Remand Awarding Reduced Attorney Fees and Costs with Enhancement Factor (2001-LHC-00926) of Administrative Law Judge Gerald M. Etchingham, BRB No. 06-0783, and the Compensation Order - Approval of Attorney Fee (Supplemental)(Case No. 14-131169) of District Director Karen P. Staats, BRB No. 06-0649, rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> In addition, we have before us claimant's timely filed motion for reconsideration of the Board's prior decision in this case, *Richards v. Stevedoring Services of America*, BRB Nos. 05-0581, 05-0582/A (Apr. 5, 2006) (unpub.).<sup>2</sup> 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant has also filed a petition requesting an attorney's fee for services performed before the Board in BRB Nos. 05-0581 and 05-0582/A. The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained work-related head, neck and upper back injuries while working for employer on May 10, 1999; he sought disability and medical benefits for his work-related neck injury, as well as for his recurrent drug addiction which he alleged was aggravated by this work incident. A settlement agreement was reached by the parties and approved by the district director on December 21, 2004. Claimant's attorney subsequently sought an attorney's fee in the amount of \$23,361.65, for services performed before the administrative law judge.<sup>3</sup> The administrative law judge awarded claimant's counsel a total fee of \$18,749.50.<sup>4</sup> Claimant's attorney also sought an

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<sup>1</sup> The Board consolidated the appeals in BRB Nos. 06-0649 and 06-0783 by Order dated November 13, 2006, for purposes of this decision. *See* 20 C.F.R. §802.104.

<sup>2</sup> We hereby consolidate claimant's motion for reconsideration in BRB Nos. 05-0581 and 05-0582/A, with his appeals of the administrative law judge's Order on remand, BRB No. 06-0783, and the district director's Order on remand, BRB No. 06-0649. 20 C.F.R. §802.104.

<sup>3</sup> This sum represented 75.5 hours of attorney time at a \$275 hourly rate, 9.75 hours of legal assistant time at a \$100 hourly rate, and \$1,624.15 in costs.

<sup>4</sup> The total fee of \$18,749.50 approved by the administrative law judge represents 69.5 hours of attorney services performed from 2001 through 2003 at \$225 per hour, six hours of attorney services performed in 2004 and 2005 at \$235 per hour, 9.75 hours of legal assistant time at the requested hourly rate of \$100, and \$727 in costs.

attorney's fee of \$8,856.25 for services performed before the district director.<sup>5</sup> The district director awarded claimant's counsel a fee of \$7,181.25.<sup>6</sup>

Claimant appealed the fee awards of both the administrative law judge, BRB No. 05-0581, and the district director, BRB No. 05-0582, arguing that they erred in awarding counsel his historical hourly rates without augmenting the fees for the delay in payment of the fees. Claimant also contended that the district director erred in reducing counsel's current hourly rate based upon her finding that the case was not complex and that work performed at the district director level warrants a lower hourly rate than work performed before the Office of Administrative Law Judges (OALJ). Claimant additionally challenged the administrative law judge's disallowance of the costs related to his drug addiction claim. In a cross-appeal, employer assigned error to the district director's failure to consider its argument that a fee for the preparation of claimant's reply to employer's objections to the fee petition is allowable only in an amount proportionate to claimant's success in defending the original fee petition. BRB No. 05-0582A.

In a Decision and Order issued on April 5, 2006, the Board held, first, that as neither the administrative law judge nor the district director discussed the issue of enhancement for delay in the payment of the attorney fees sought by counsel, the case must be remanded to both the administrative law judge and the district director for the necessary findings regarding this issue. Next, the Board held that the district director did not commit legal error by reducing counsel's requested hourly rates on the basis of the lack of complexity of the case; the Board also held that the district director did not reduce the requested hourly rates solely on the basis that the services were performed at the district director level. With respect to employer's cross-appeal, the Board directed the district director to reconsider the fee requested for claimant's reply to employer's objections to the fee petition in light of the degree of claimant's ultimate success in pursuing his original fee petition. Lastly, the Board held that as the administrative law judge rationally found that the drug addiction claim did not represent a compensable claim under the Act, he properly disallowed the costs itemized for the acquisition of medical records related to that claim. *Richardson v. Stevedoring Services of America*, BRB Nos. 05-0581, 05-0582/A (Apr. 5, 2006) (unpub.).

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<sup>5</sup> This sum represented 24.75 hours of attorney time at a \$275 hourly rate, 19 hours of legal assistant time at a \$100 hourly rate, and \$100 in costs.

<sup>6</sup> This fee award represents seven hours of attorney services performed in 1999 through 2000 at \$210 per hour and 17.75 hours of attorney services performed from 2003 to 2005 at \$225 per hour, as well as 2.5 hours of legal assistant services performed in 1999 through 2000 at \$75 per hour and 17 hours of legal assistant services performed from 2003 to 2005 at \$90 per hour. The district director did not award the \$100 in costs requested by claimant's attorney.

Thereafter, claimant filed a timely motion for reconsideration of the Board's decision. Prior to the filing of claimant's motion for reconsideration, however, the district director entered a Compensation Order – Approval of Attorney Fee (Supplemental) on remand. In this Order, the district director, while acknowledging that an enhancement for delay was appropriate in this case, stated that adjustments for such delay were already reflected in her original fee award. The district director further stated that as claimant's attorney was 82 percent successful in pursuing his original fee award, he was entitled to 82 percent of what would have been approved for his supplemental fee request. Accordingly, the district director awarded claimant's counsel a total fee of \$7,469.25. Additionally, while claimant's motion for reconsideration was pending before the Board, the administrative law judge issued a Supplemental Order After Remand. In this Order, the administrative law judge found that an enhancement for delay was appropriate and he therefore awarded claimant's counsel an hourly rate of \$235 for all of the attorney services performed before the administrative law judge. Thus, the administrative law judge awarded claimant's attorney a fee of \$19,444.50.

Claimant subsequently filed timely appeals of the fee awards issued on remand by both the district director, BRB No. 06-0649, and the administrative law judge, BRB No. 06-0783.<sup>7</sup> Employer has filed responses to claimant's motion for reconsideration of the Board's decision in BRB Nos. 05-0581, 05-0582/A, and claimant's appeals in BRB Nos. 06-0649, 06-0783. In addition, claimant has requested an attorney's fee for work performed before the Board with respect to his initial appeal and motion for reconsideration in BRB Nos. 05-0581, 05-0582/A.

Initially, we reject claimant's argument that the district director and the administrative law judge lacked jurisdiction to issue Orders awarding attorney fees on remand while this matter was still pending before the Board. Although it would have been preferable for the district director and the administrative law judge to defer issuing attorney fee awards on remand until after the Board addressed claimant's timely filed motion for reconsideration of the Board's decision in BRB Nos. 05-0581, 05-0582/A, any error on the part of the district director and the administrative law judge in issuing decisions on remand while claimant's motion for reconsideration was pending before the Board is harmless in view of our review herein of both claimant's motion for reconsideration and his new appeals.<sup>8</sup>

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<sup>7</sup> The Board deferred ruling on claimant's pending motion for reconsideration of the Board's previous decision in this case, BRB Nos. 05-0581, 05-0582/A, until briefing in the new appeals was completed and a consolidated decision could be issued.

<sup>8</sup> In his motion for reconsideration, claimant contends that the Board erred by giving the administrative law judge and the district director the discretion on remand to determine whether to compensate counsel for the delay in the payment of his counsel's fees. As both the administrative law judge and the district director determined on remand that claimant's attorney was entitled to an enhancement for delay, this issue is moot. We

We next consider the arguments raised by claimant with respect to the district director's attorney fee award. First, we agree with claimant that the district director erred in her consideration on remand of the enhancement for delay issue. In its initial decision, the Board remanded the case for the district director to make findings regarding claimant's counsel's entitlement to an enhancement for the delay in the payment of his fee. See *Richardson*, slip op. at 4-5; *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). On remand, the district director specifically found that the delay in this case warrants an enhancement of claimant's attorney's fee. Comp. Order (Supplemental) at 1. She further found, however, that adjustments for this delay were already reflected in the hourly rates awarded in the original fee award, *id.*, and she therefore awarded the same hourly rates on remand that she had previously awarded in her initial Order. *Id.* at 2. Our review of both of the district director's fee awards discloses that her reasoning with respect to the delay enhancement issue is flawed. In her initial fee order, the district director found that the reasonable hourly rates for work performed from 2003 through 2005 were \$225 for attorney services and \$90 for legal assistant services. Comp. Order at 3. Thus, her award of hourly rates of \$210 for attorney services and \$75 for legal assistant services for work performed at an earlier time, from 1999 to 2000, Comp. Order (Supplemental) at 2, indicates that this portion of her fee award did not, in fact, encompass an enhancement for delay.<sup>9</sup> We therefore hold that the district director erred in awarding lower hourly rates for the attorney and legal assistant work performed from

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briefly address claimant's argument, however, in order to clarify our previous discussion of this issue. Where counsel timely raises the delay between the performance of counsel's services and the payment of his fee, this factor must be considered by the body awarding the fee in determining a reasonable attorney's fee. See *Missouri v. Jenkins*, 491 U.S. 274, 283-284 (1989); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9<sup>th</sup> Cir. 1996); *Allen v. Bludworth Bond Shipyard*, 31 BRBS 95 (1997); *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 96-98 (1995). In this respect, claimant is correct that if a delay in the payment of fees is established, the delay must be accounted for in the awarded fee. The body awarding the fee, however, is authorized to determine whether such a delay has, in fact, occurred, and the length of the delay is a relevant factor in determining a reasonable attorney's fee. See generally *Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 96-98. The fact-finder has considerable discretion in selecting a reasonable method of enhancement. *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT); *Allen*, 31 BRBS at 96-97; *Nelson*, 29 BRBS at 97-98.

<sup>9</sup> In her order on remand, the district director stated summarily that the \$210 rate reflected a current rate for the type of investigative services performed during that period. As her initial award stated that this rate was appropriate for the time when the work was performed, this finding is not an adequate basis to support the conclusion that delay is encompassed in the rate. Moreover, with regard to the rationale that certain services warrant a lower rate, see discussion, *infra*.

1999 to 2000 than for the work performed from 2003 to 2005. *See Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT).

We do not find merit, however, in claimant's argument that the district director erred in reducing his requested hourly rate for attorney services from \$275 to \$225. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9<sup>th</sup> Cir. 1995); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4<sup>th</sup> Cir. 2004); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10<sup>th</sup> Cir. 1997). Contrary to claimant's contention, the district director's reduction of counsel's requested hourly rate on the basis of the lack of complexity of the issues in this case does not constitute legal error as that factor is specifically enumerated in the applicable regulation, 20 C.F.R. §702.132.<sup>10</sup> Claimant further argues that the district director improperly reduced counsel's requested hourly rates on the basis that services performed at the district director level warrant a lower hourly rate than do services performed before the administrative law judge. As claimant asserts, the Board has held that there is no statutory or regulatory basis for distinguishing between trial and non-trial work in determining reasonable hourly rates, *see Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184, 194 (1989)(*en banc*), *aff'd in part and rev'd in part on other grounds*, 898 F.2d 1088, 23 BRBS 61(CRT) (5<sup>th</sup> Cir. 1990); *Kauffman v. Brady-Hamilton Stevedore Co.*, 12 BRBS 544 (1980). In our original decision in this case, we rejected claimant's argument in this regard on the basis that the district director appropriately considered the regulatory factors and did not reduce the requested hourly rate solely on the basis that the services were performed at the district director level. *See Richardson*, slip op. at 5 n.9. We reaffirm that holding; any error committed by the district director in stating that the hourly rates awarded for work performed at the district director level are customarily lower than the rates awarded for work performed at the administrative law judge level, *see Comp. Order* at 3, 5, is harmless in view of the district director's subsequent proper consideration of the other regulatory factors and the overall reasonable rate determined by the district director. Therefore, as the district director appropriately considered the factors enumerated in Section 702.132, we affirm her reduction of the requested hourly

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<sup>10</sup> We reject claimant's assertion that pursuant to *Blum v. Stenson*, 465 U.S. 886 (1984), wherein the United States Supreme Court held that neither complexity nor novelty of the issues "is an appropriate factor in determining whether to *increase* the basic fee award," *id.* at 898-899 (emphasis added), a requested hourly rate cannot be reduced due to the lack of complexity of a case, as the converse of a proposition is not always true.

rate to \$225.<sup>11</sup> Accordingly, we modify the district director's fee award to reflect hourly rates of \$225 for all attorney services and \$90 for all legal assistant services dating back to 1999.

We further reject claimant's contention that the district director committed legal error in her reconsideration on remand of the amount of claimant's fee to be awarded for his reply to employer's objections to his initial fee petition. Consistent with the Board's previous decision in this case, *Richards*, slip op. at 6, the district director reconsidered counsel's fee request for this work in light of the degree of claimant's ultimate success in pursuing his original fee petition. See *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Thompson v. Gomez*, 45 F.3d 1365, 1367-68 (9<sup>th</sup> Cir. 1995). As the original fee award was 82 percent of the requested fee, the district director found that counsel was entitled to 82 percent of the supplemental fee requested for defending the original fee petition, based on a \$225 hourly rate. Comp. Order (Supplemental) at 2. Contrary to claimant's contention that the district director erred in evaluating the extent of claimant's success based on the amount of the fee rather than on an issue-by-issue basis, *Hensley* does not mandate an issue-by-issue evaluation of the degree of claimant's success. *Hensley*, 461 U.S. 424. Rather, the Supreme Court held in *Hensley* that the amount of the fee must be reasonable given the results obtained. *Id.*, 461 U.S. at 434-437. In the instant case, as claimant succeeded in partially deflecting employer's objections to the original fee petition, the district director rationally awarded a supplemental fee request that was proportionate with that limited success. See *Hensley*, 461 U.S. 424; *Thompson*, 45 F.3d 1365.

We now turn to claimant's contentions regarding the administrative law judge's award of an attorney's fee. On remand, the administrative law judge found claimant's attorney entitled to an enhancement for delay, Supplemental Order After Remand at 5, and he therefore awarded an hourly rate of \$235 for all of claimant's attorney's services dating back to 2001. *Id.* at 6-7. On appeal, claimant avers that the administrative law judge was required to enhance the requested fee by applying counsel's market rates as of the date that the decision on remand was issued. We disagree. The body awarding an attorney's fee has considerable discretion in selecting a reasonable method to compensate for the delay. *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT); *Allen*, 31 BRBS at 96-97; *Nelson*, 29 BRBS at 97-98. The fact-finder may award current rates, historic rates adjusted to reflect present values, or may employ any other reasonable method to compensate counsel for the delay in payment of the fees. See *Jenkins*, 491 U.S. at 283-284; *Anderson*, 91 F.3d at 1325, 30 BRBS at 69(CRT); *Allen*, 31 BRBS at 97; *Nelson*, 29 BRBS at 97. Findings in this regard are reviewed on appeal under an abuse of discretion standard. See *Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 97. Furthermore, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, stated in *Anderson* that claimants' attorneys are not entitled

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<sup>11</sup> The degree of success claimant achieved in this case was not a factor in the district director's original hourly rate determination which she reaffirmed on remand.

to fee enhancements for delays due to appeals of attorney's fee awards.<sup>12</sup> 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT). As the method employed by the administrative law judge in compensating counsel for the delay in payment of his fees is reasonable, it is affirmed. See *Anderson*, 91 F.3d at 1325, 30 BRBS at 68-69(CRT); *Nelson*, 29 BRBS at 97.

We next consider the argument made in claimant's motion for reconsideration of the Board's initial decision that the Board erred in affirming the administrative law judge's disallowance of the litigation costs incurred in acquiring medical records related to claimant's drug addiction claim. In upholding the administrative law judge's disallowance of these costs, the Board stated that "[i]t is inherent in the Act that reasonable and necessary costs must be related to a compensable claim." *Richards*, slip op. at 5. The Board held that the administrative law judge rationally found that the addiction claim did not remain as a viable claim in the settlement<sup>13</sup> and, thus, did not represent a compensable claim under the Act. In his motion for reconsideration, claimant avers that the parties' settlement agreement did not limit claimant's attorney's fees and costs to only those related to his neck claim and that his agreement to dismiss his addiction claim was based in part on the understanding that employer would pay the attorney's fees and costs associated with the addiction claim. We decline to reconsider our previous decision on this issue, and we reaffirm our holding that the administrative law judge rationally construed the terms of the settlement agreement as providing that the

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<sup>12</sup> We do not agree that the Ninth Circuit's decision in *Christensen v. Stevedoring Services of America, Inc.*, 430 F.3d 1032, 39 BRBS 79(CRT) (9<sup>th</sup> Cir. 2005), cited in claimant's brief, requires that a fee enhancement be awarded for the delay due to claimant's appeals of the attorney's fee awards in this case. In *Christensen*, the claimant filed an action in federal district court to enforce the administrative law judge's attorney's fee award while his appeals of both the underlying compensation award and the attorney's fee award were pending before the Board. The Ninth Circuit upheld the district court's dismissal of the enforcement action for lack of jurisdiction, observing that claimant's counsel may seek additional fees due to delays associated with appeals of the underlying compensation awards. Unlike *Christensen*, the underlying compensation award was not appealed in the instant case and thus, consistent with the Ninth Circuit's decision in *Anderson*, a fee enhancement is not available for delay due to claimant's appeals of the attorney's fee awards. *Anderson*, 91 F.3d at 1325 n.3, 30 BRBS at 69 n.3(CRT).

<sup>13</sup> In this regard, the Board relied on claimant's agreement to an order dismissing with prejudice the addiction claim, see Settlement Appl.- Paragraph 30, and claimant's assent to inclusion of the statement that the parties agree that claimant's recurrent addiction is unrelated to his work injury. See Settlement Appl.- Paragraph 31; *Richards*, slip op. at 5-6.

addiction claim was not part of the overall settlement.<sup>14</sup> See *Richards*, slip op. at 6; see generally *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

Claimant also asserts on reconsideration that the Board's affirmance of the administrative law judge's disallowance of the costs associated with the addiction claim is inconsistent with its holding in *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999), that a claimant's failure to prevail on one issue does not affect his right to recover litigation costs related to that issue. We disagree. In *Ezell*, the employer argued that an analysis of the level of success attained by the claimant should be applied to an award of litigation costs under Section 28(d), 33 U.S.C. §928(d), citing the Supreme Court's decision in *Hensley*, 461 U.S. 421, as support for this argument. The Board rejected the employer's argument that a *Hensley* analysis must be applied to an award of costs, reasoning that Section 28(d) requires only an analysis of the reasonableness and necessity of the costs incurred by the claimant's attorney in litigating the case. *Ezell*, 33 BRBS at 31. Unlike *Ezell*, which involved a single injury and limited success on the disability and medical claims related to that injury, the instant case involves two separate claims: a successful claim for claimant's neck injury and an unsuccessful claim for claimant's recurrent drug addiction. The two claims in this case are thus for separate injuries. As we stated in our prior decision in this case, it is inherent in the Act that only those reasonable and necessary costs that are incurred in litigating a claim for a *compensable* injury are recoverable. *Richards*, slip op. at 5. The holding in *Ezell* is thus distinguishable as it did not address costs for a separate claim for a condition which was not work-related. We therefore reaffirm our holding that as the drug addiction claim is for a non-compensable injury, costs incurred in litigating that claim are not awardable under Section 28(d). Thus, the administrative law judge properly disallowed the \$897.15 in costs related to claimant's drug addiction claim.

Lastly, claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in BRB Nos. 05-0581 and 05-0582/A. Employer has filed objections to the fee petition,<sup>15</sup> and claimant has filed a reply to those objections as well

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<sup>14</sup> It is well-established that the Board is not empowered to reweigh the evidence or substitute its views for those of the administrative law judge. See generally *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9<sup>th</sup> Cir. 2002); *Mendoza v. Marine Personnel Company, Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5<sup>th</sup> Cir. 1995). It is the administrative law judge's role to draw his own inferences from the evidence and as the inferences drawn by the administrative law judge in the instant case regarding the settlement agreement are reasonable, they are reaffirmed. *Id.*

<sup>15</sup> As we have ruled on claimant's motion for reconsideration in this Decision and Order, employer's objection that claimant's attorney's fee petition is premature is rendered moot. We further reject employer's objection to the form of the fee application. Contrary to employer's contention, claimant's counsel's fee petition sufficiently

as a supplemental fee request. Specifically, claimant's attorney seeks a fee in the amount of \$9,730, representing 23 hours of attorney services at an hourly rate of \$350 and 1.75 hours of legal assistant time at an hourly rate of \$110, plus an additional 4.25 hours of attorney work at an hourly rate of \$350 for the preparation of a reply to employer's response to claimant's motion for reconsideration and a reply to employer's objections to the original fee petition.

Although the Board rejected several of claimant's arguments regarding the original fee awards of both the district director and the administrative law judge, counsel nonetheless succeeded in obtaining increased fees as a result of his appeals and, thus, is entitled to a fee for work performed before the Board. 20 C.F.R. §802.203(e). As a result of his appeals, however, claimant succeeded in obtaining additional fees from the district director and the administrative law judge amounting to only \$1,125.50. In light of claimant's limited success with respect to the arguments presented to the Board and the relatively small increase in his fees as the result of his appeals, we hold that the hours itemized by claimant's counsel, when multiplied by a reasonable hourly rate, would result in an excessive award. *See Hensley*, 461 U.S. at 435-436; 20 C.F.R. §802.203(e). Based on our consideration of the factors enumerated in Section 802.203(e), the particular facts and issues of this case, and claimant's relative degree of success, we determine that claimant's counsel is entitled to a fee for 15 hours of attorney services.<sup>16</sup> Moreover, having considered claimant's counsel's statements in support of his requested hourly rate as well as employer's objection to the requested rate, we reduce the hourly rate for attorney work to \$250 as that rate is reasonable and customary for the area where the services were rendered. 20 C.F.R. §802.203(d)(4). Claimant is therefore awarded an attorney's fee of \$3,942.50 for work performed before the Board in BRB Nos. 05-0581 and 05-0582/A, payable by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the district director's Compensation Order - Approval of Attorney Fee (Supplemental) is modified to reflect an hourly rate of \$225 for all attorney time and an hourly rate of \$90 for all legal assistant time; in all other respects, her Compensation Order is affirmed. The administrative law judge's Supplemental Order After Remand Awarding Reduced Attorney Fees and Costs with Enhancement Factor is affirmed in all respects. Claimant's attorney is awarded a fee of \$3,942.50 for work performed before the Board in BRB Nos. 05-0581 and 05-0582/A, to be paid directly to counsel by employer.

SO ORDERED.

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distinguishes the services performed in each of the appeals, BRB No. 05-0581 and BRB Nos. 05-0582/A, for which he seeks a fee for work performed before the Board.

<sup>16</sup> We approve the 1.75 hours of legal assistant work sought by counsel at the requested hourly rate of \$110.

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ROY P. SMITH  
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL  
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully disagree with my colleagues with respect to the reversal of the district director's award of fees for services performed in 1999 to 2000. The majority finds that the district director erred in awarding lower hourly rates for the attorney and legal assistant work performed from 1999 to 2000 than for the work performed from 2003 to 2005. They do so on the basis that the award of \$225 per hour for attorney services and \$90 per hour for legal assistant services, for work performed from 2003 to 2005, indicates that the fee award of \$210 per hour for attorney services and \$75 for legal assistant services performed in 1999 to 2000 did not include an enhancement for delay. However, this disregards the specific statements and findings of the district director. On remand, the district director states that an enhancement for delay was included in the initial award. Comp. Order (Supplemental) at 1-2. This statement is not inherently incredible, particularly in view of the district director's findings as to the complexity of the work involved in 1999 to 2000, all of which the district director found lacked complexity, Comp. Order at 3, as compared to that performed in 2003 to 2005, some of which the district director found complex, Comp. Order at 5. More specifically, it is not inherently incredible that the \$210 per hour award made by the district director in 2005 encompassed both a recognition of work performed in 1999 to 2000, which was less complex than that performed in 2003 to 2004, and an enhancement of fees due to delay. Since we review the district director's award under an abuse of discretion standard, *see Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980), and no such abuse has been shown, I would affirm the district director's award. In all other respects, I concur in my colleagues' decision.

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JUDITH S. BOGGS  
Administrative Appeals Judge

